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DICTA

Vol. IX JULY, 1932 No. 9

+ + + *Dicta Observes* + + +

WHO MAY PRACTICE, AND WHAT CONSTITUTES THE PRACTICE OF LAW*

A review of bar journals and publications from the nation at large indicates a growing tendency eventually to return the practice of law to the hands of those only to whom it was entrusted when Coke and Blackstone were names far more familiar than they now are, and one State Supreme Court apparently has found it necessary, at least advisable, to define what constitutes the practice of law.

Undoubtedly the incorporation of the ever-increasing multitude of associations and agencies for the purpose of using the practice of law as a business, and placing it on a level with a grocery, department store, or manufacturing establishment—wholly disregarding that the law is a profession, the conduct of which must be kept on the highest plane—has caused the leaders of the bar to pause and consider whether it may not be time to find out where we are drifting.

When I refer to the practice of law as a business I mean the great number of agencies or associations which are ostensibly collection agents but which purchase accounts and thereby become directly and pecuniarily interested in the subject matter later to be discussed with a debtor or third party and in any litigation which may arise, which hire one or more attorneys at a fixed yearly salary to collect their pecuniary interest in the legal business which it is transacting.

It was recognized in the earliest days of the law that the counselor should have no pecuniary interest, other than his fee, in the matter entrusted to him, and champerty and maintenance were the barriers erected against the practitioner who

*By ROY O. SAMSON, of the Denver Bar.

otherwise might have disregarded the high ethics of his profession.

Nearly every state forbids one to practice law unless duly qualified and licensed, under penalty. Few states have thought it necessary to define the practice of law and it may become necessary for future legislatures, or state supreme courts, to follow the example of the Supreme Court of Georgia, in the recent case of Boykin, Solicitor General vs. Hopkins, et al, which practically changed the definition of what constitutes the practice of law in that state as it was fixed by the decision in Atlanta Title & Trust Co., vs. Boykin, 172 G. 437, in which the court confined the work of the lawyer to that *in the courts* and practically left the outside to anyone who desired to practice, but the recent case declares

"we are of the opinion that the practice of law at the time the application for charter in this case was made, was not confined to practice in the courts of this State; but was of larger scope, including the preparation of pleadings and other papers incident to any action or special proceedings in any court or other judicial body, conveyancing; the preparation of all legal instruments of all kinds whereby a legal right is secured; the rendering of opinions as to the validity or invalidity of the title to real or personal property, the giving of any legal advice; and any action taken for others in any matter connected with the law."

In that connection it is interesting to note the action of the General Assembly of Virginia for 1932. Prior to 1932 the practice of law in Virginia was apparently confined to acts done *in court* but the General Assembly this year broadened the scope so as to include

"improper solicitation of any legal or professional business or employment either directly or indirectly; also providing that contracts secured for attorneys by runners and cappers shall be void, and providing penalties therefor; defining a runner or capper as any person, firm, associate, or corporation acting in any manner or in any capacity as an agent for an attorney at law in the solicitation or procurement of business for such attorney at law, etc."

By analogy there is but little difference between the situation thus sought to be reached by the Virginia legislature, and the act of the various collection agencies in advertising that they maintain a legal department, or advertising the purchase and collection of accounts in which they have a pecuniary interest.

It is elemental, and fundamental, that a corporation or association cannot practice law for the reason that it cannot

comply with the requirements which are imposed upon individuals as prerequisites to enable them to obtain license to practice. The great weight of decisions of almost all of the states of this country agree with the above proposition in denying corporations the right to practice.

One collection agency in this city advertises that it maintains a legal department. Another agency sends out collection letters somewhat in simulation of process and in a column provided therefor lists the amount of the indebtedness and a fixed "docket fee" in addition and thus may mulct an ignorant or uninitiated individual. Another agency used to issue collection demands strongly simulating process but discontinued the form of the letters when complaint was referred to a grievance committee. Still other agencies offend in various ways.

There are numerous individuals who appear daily in our justice of the peace courts as assignees of claims, who prepare a complaint, try the issues of a case, assume to know the law and rules of practice, appeal an unfavorable decision to the county court and actually practice law without other qualification or license.

So far as Colorado is concerned, Sec. 6017 C. L. 1921, provides punishment for contempt of the supreme court for any unlicensed person who practices law in *courts of record.* Does the rule of strict construction of a penal statute permit unlicensed persons to practice in justice of the peace courts, the latter not being courts of record, or is the power of our Supreme Court sufficiently plenary to regulate and control the practice of law in the justice courts? Our constitution gives the Supreme Court a general control over all *inferior* courts, and Supreme Court Rule 83c forbids practice in justice of the peace courts of disbarred attorneys and applicants for admission to the bar rejected because unable to show good character. But, did the Supreme Court by the passage of that rule and its specific prohibition against a certain class of persons feel that there was a question of its power otherwise to regulate the practicing personnel of such courts?

It could hardly be so construed, as the disbarred attorney has resumed his role of a layman and the rejected applicant never has departed therefrom, and if such individuals can be barred from the justice courts for moral unfitness, lack of

preparation to acquire the mental qualifications requisite for admission to the bar of this state, as well as failure to become licensed to practice, should be sufficient to bar the rest of the laymen.

"Lawyers have been the object of criticism since first they made their appearance, but not until they had become group conscious and organized did they become articulate on this issue. In associations they began to discover their weaknesses and their strength. Once launched, the movement toward bar organization spread rapidly into a network of state and local associations and a national association. These associations, while they devote time to the discussion of problems inherent to the profession, and to matters social, give attention to definitions of professional objectives. They have formulated codes of ethics; they have been influential in setting standards for admissions to the bar; they have advocated the disbarment of undesirable members; and, through committees and representatives, they have pressed these issues before the courts. Many of their efforts, no doubt, are futile and ill-conceived. Much that is desirable they leave untouched and undone. But with all, they are today conscious, at least on the part of many of their leaders, that the bar must improve its situation in the public esteem or relinquish its position of leadership in public affairs. And with this there has come a feeling, faltering at first but growing in intensity, that one of the faults of the profession lies in the ethical and mental caliber of its membership".

(In the BAR EXAMINER, May 1932, by Albert J. Harno, Dean, College of Law, University of Illinois).

For many years the members of the legal profession swayed and guided the destinies of the nation and of the states, because the profession was held on a high plane and was so regarded, but in later days the attorney has acquired some disrepute. Efforts should be made looking towards the restoration of our profession to its former high estate. With proper co-operation the unlawful practice of the law can be stopped.

The Chicago Bar Association, aroused by charges of incompetency and corruption against judges and lawyers, has started four investigations to "rid the legal profession of any hint of racketeering." Vouchsafing absolute justice, leaders in the inquiry promised today to "vindicate any judge or lawyer who deserves it but to condemn those against whom conclusive evidence is found."

In 1931 changes in rules for admission to the bar were made in twenty-five states, the great majority of the changes making for higher standards, but when one learns from the

report of the Justice Court Committee (Dicta, June, 1932) that our justice court cases alone for the past two years averaged 690 civil cases monthly, one can appreciate that the effort of bar associations to restore the confidence of the people in the profession is meeting a serious obstacle when the law is being used as a business by corporations and individuals otherwise unqualified as counselors at law and certainly unlicensed and not permitted to practice in courts of record.

The broadest mind, and the most charitably inclined person will agree that the conduct of collection agencies and laymen-assignees as above related amounts to the practice of law as a business, and if such conduct cannot now be reached by statute, or by the power of a supreme court to regulate and control the practice of the law, it is time the legislature should enact statutes closing the justice of the peace courts to all except licensed attorneys, and defining what acts and conduct constitute the practice of law.

NOTICE

Mr. F. D. Stackhouse, Clerk of the Denver District Court calls attention to the following schedule and dates during which the various Judges will hold Court during the summer vacation period:

June 27th, 1932 to July 9th Inc., Judge Charles C. Sackman,
July 11th, 1932 to July 23rd Inc., Judge E. V. Holland,
July 25th, 1932 to Aug. 6th Inc., Judge Henley A. Calvert,
Aug. 8th, 1932 to Aug. 20th Inc., Judge J. C. Starkweather,
Aug. 22nd, 1932 to Sept. 3rd Inc., Judge George F. Dunklee.

All Divisions convene September 6th, 1932.

REPORT OF BAR OUTING

By Charles J. Munz, Jr.

IN lieu of an annual dinner the Bar Association concentrated its efforts on making a success of the Fifth Annual Bar Outing at Mount Vernon Country Club on the 16th day of June, 1932. The usual sports and activities were carried on and the members of the bar demonstrated their abilities as athletes in their respective favorite branches of the sports.

The winners of the horseshoe tournament were Kenneth Wormwood for the lawyers and Judge Robert W. Steele, Jr. for the judges, and the champion of all was Kenneth Wormwood, and incidentally time must be telling upon two of our most famous athletes of the past, namely, Albert J. Gould, Jr. and Judge Wilbur M. Alter, both of whom were defeated by younger and more vigorous opponents. Hugh McLean and Sam Frazin were the Tildens of the tennis court and go down as champions, and as usual Bill Koolbeck, whom I have a suspicion is a professional, won the golf tournament, and of course there were others who received prizes in these events.

The Solitaire Cowboys furnished us with a very melodious and enjoyable program of songs.

An outstanding feature of the evening's program consisted in the presentation of an ebony gavel to Elmer Brock, the outgoing President, by Albert J. Gould, Jr., the incoming President, in appreciation of the work Mr. Brock had done during the year and as a manifestation of the esteem in which the bar association held its president. This incident was very fine and should be followed from now on.

King Elmer (Brock) made a very worthy master of ceremonies, despite the omnipresent, soft-spoken and quiet-mannered Frank Fetzer. Though we had 180 lawyers, judges and guests present at the gathering and though a very good portion of these had no ear for music nor feet for dancing nor arms nor legs to carry on the more strenuous features of the program, yet in the cool of the evening when the refreshments were served, it seemed that they all were there with the result that everyone seemed to have a very enjoyable time.

FROM THE RETIRING PRESIDENT

ELMER L. BROCK

Members of the Denver Bar Association:

The Editor has very kindly asked me for a brief statement in connection with the change of administration.

First of all, I desire to express my appreciation of the honor conferred upon me by the Association, and my very great pleasure in the co-operation of the membership during my term as President. I have found a very great delight in my contacts with the officers and committees. Every committee has functioned well. I do not deem it necessary to report fully upon the various activities of the Association, and the work of the committees. However, I would not be satisfied to let this opportunity pass without a special word of commendation of the faithful and valuable services rendered by two of the committees. I refer to the New Court House Committee, of which Mr. Frank L. Fetzer was chairman, and the special committee on the Justice of the Peace Courts, of which Horace N. Hawkins was chairman. The former committee performed unusually valuable services to the Bench and Bar in getting the quarters for the courts in the new court house rearranged with decided improvement over the original plans. The latter committee worked diligently on its important task, meeting nearly every day for a period of two weeks, and the foundations have been laid for the long needed modifications in the

laws with reference to these courts. I understand the same committee will be continued for the purpose of carrying out the program already adopted.

As a result of my experience during the past year, I am more convinced than ever of the great worth of the Denver Bar Association, and of the importance of active participation on the part of the membership. Such active participation is needed to promote the great objects of the Association, and to bring about a greater friendship, and a better understanding among the lawyers.

The Association has made a wise selection of officers for the coming year. Mr. Gould knows the problems of the Association, perhaps better than any other member, and with such co-operation as I have been fortunate enough to have from the members, his administration should be very successful.

ELMER L. BROCK,
Retiring President

MEMORIAL SERVICES

MEMBERS of the Denver Bar Association, Justices of the Supreme Court, Judges of the District, Juvenile and Justice Courts, held memorial services for deceased members who had passed on during the preceding year.

The following speakers gave addresses honoring the memory of the departed:

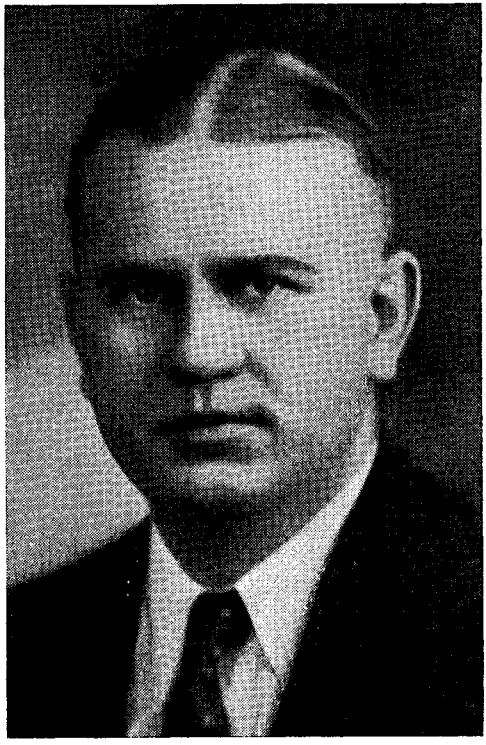
Deceased Members	*Speakers*
Charles R. Bosworth	H. H. Tangeman
Frederick T. Henry	Kenneth W. Robinson
Herman E. Luthe	Charles S. Thomas
Booth M. Malone	Roy C. Hecox, Sr.
Edwin H. Park	Norton Montgomery
George Q. Richmond	James A. Marsh
Barnwell S. Stuart	Lawrence Lewis

The Memorial Committee in charge were

George E. Tralles, Chairman

Charles M. Deardorff
Erskine R. Myer
Horace N. Hawkins
Edgar McComb

FROM THE INCOMING PRESIDENT



ALBERT J. GOULD, JR.

Members of the Denver Bar Association:

The Denver Bar Association should devote its time to the study and solution of matters directly affecting the legal profession. Those members who desire to participate in civic activities, except those which directly affect the Bench or the Bar, should do so through other organizations created for the purpose. In this way we can have a united Bar; otherwise not.

John A. Carroll has been appointed Secretary-Treasurer and I know his ability, tact and popularity will make him a capable, efficient officer.

A list of the committees for this year appears elsewhere in this issue. Many new names appear upon these committees, and they have been enlarged to bring more members into active participation in the affairs of the Association. Committees will meet frequently with the officers and report their activities to the Association.

We can perform the greatest service to our community and our profession by improving our knowledge of the law, and by assisting in the determination of matters directly affecting the Bench and Bar. To this end, the officers for the coming year solicit your cooperation and support.

ALBERT J. GOULD, JR.,
President

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1932-1933

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NEW PROVISIONS OF THE REVENUE ACT OF 1932 RELATIVE TO FEDERAL INCOME TAXES*

By Arthur J. Lindsay

THE new Federal tax law, known as the Revenue Act of 1932, contains certain very important changes, as well as increased rates, which justify careful consideration.

The following is a brief summation of the more important provisions of the Federal Revenue Act of 1932 pertaining to the *income taxes* imposed upon individuals and corporations. (The various estate, gift, stamp, excise, import, and other taxes are not discussed herein.)

The tax rates under the 1932 Act are substantially higher than the rates of the 1928 Act, as shown hereinafter by the comparative tables.

The 1932 Act became a law June 6, 1932; however, the income tax provisions are generally speaking retro-active and effective as of January 1, 1932.

The Revenue Act of 1932 is in substance a complete new law.

The following tabulation presents comparisons of the tax rates for individuals and corporations for the year 1931 (governed by the amended 1928 Revenue Act) and the new rates effective January 1, 1932 provided by the 1932 Revenue Act.

TAX RATE COMPARISON TABLE

INDIVIDUALS

NORMAL INCOME TAX RATES

Personal Exemptions:	*1928 Act*	*1932 Act*
Single	$1,500	$1,000
Family head or married	3,500	2,500
Credit for each dependent	400	400
Tax Rates	*Per Cent*	*Per Cent*
First $4,000	1½%	4%
$4,000 to $8,000	3%	8%
Over $8,000	5%	8%

*Dicta is indebted to the author of this timely article dealing with the 1932 Revenue Act. The author is a Certified Public Accountant and Tax Consultant, and an authority upon tax matters.

CORPORATIONS

INCOME TAX RATES

	1928 Act	*1932 Act*
Tax Rate, Per Cent	12%	13¾%
Exemption	$3,000	None
Extra Tax on Consolidated Returns	NONE	¾%

Earned Income Credit for Individuals. The earned income credit provided by prior laws has been discontinued under the 1932 Act.

Exemptions. It is important to note in the foregoing table of tax rates that the personal exemptions for individuals have been reduced, while the former exemption for corporations has been eliminated altogether.

Dependents. The $400 credit for dependents is unchanged, except that the deduction is not now determined solely by status at the end of the year. The credit is prorated by months if a change in the status occurs during the year.

Dividends. Dividends are subject to surtax, but are exempt from normal tax if the corporation which paid them is not an exempt corporation. Dividends received by a corporation are not taxable if they are received from a corporation which is subject to the Federal income tax. They are to be reported as income on a corporation return, but may be entered in the same amount as a deduction.

Net Losses. Under the 1932 Act net losses from the ordinary operation of a trade or business (commonly referred to as statutory net losses) can be carried over and deducted in the one next succeeding year *only*. For example, a statutory net loss incurred in the ordinary operation of a trade or business during the year 1931 can be carried over and deducted in the year 1932 only. Furthermore, a statutory net loss for the year 1930 may *not* be carried forward beyond 1931. Under prior laws a statutory net loss had a carry-over of two successive years.

Two separate and distinct classes of profits or losses from the purchase and sale of stocks and bonds (when such transactions do not constitute the taxpayer's ordinary trade or business):

A. Profit or loss from the purchase and sale of stocks and bonds held for LESS *than two years.*

B. Profit or loss from the purchase and sale of stocks and bonds held for MORE *than two years (defined as capital gains or losses).*

Note: If securities are held for exactly two years then sold on the last day of the two year period, such transaction would come under the first class (A).

A. Profits or losses of the first class, that is arising from the purchase and sale of stocks and bonds held for less than two years:

The new law defines "stocks and bonds" as (1) shares of stock in any corporation, or (2) rights to subscribe for or to receive such shares, or (3) bonds, debentures, notes, or certificates or other evidences of indebtedness, issued by any corporation (other than a government or political subdivision thereof), with interest coupons or in registered form, or (4) certificates of profit, or of interest in property or accumulations, in any investment trust or similar organization holding or dealing in any of the instruments mentioned or described above, regardless of whether or not such investment trust or similar organization constitutes a corporation within the meaning of the Act.

The 1932 Revenue Act places a new limitation on the deductibility of stock and bond losses held less than the two years as follows:

If the stocks and bonds are not capital assets, that is, if they have been held two years or less, *losses from their sale or exchange are deductible in the return of the year in which they were sustained only to the extent that there are gains in such year from such two years' old or less sales or exchanges. The nondeductible balance can be carried forward to the following year's return and applied against gains of that year from similar transactions of sales or exchanges of stocks or bonds that are two years old or less, provided, first, that there is deducted from such excess the amount of any losses brought forward from the preceding year, and, second, that the remainder may not be carried forward in an amount exceeding the net income of the taxpayer for the current taxable year.*

Dealers in securities and incorporated banks and trust companies are not subject to these provisions. Their losses are deductible as under prior laws. Short sales are included

in the limitation, also gains or losses attributable to privileges or options to sell such stocks and bonds, as well as from sales or exchanges of such privileges or options.

B. If the stocks and bonds have been held *more* than two years by a taxpayer they are capital assets and losses arising from their disposition are allowed as capital losses as under prior law, so to be compared with capital gains of the year from sales or exchanges of capital assets to determine the "capital net gain" for the year reportable at taxpayer's election at the 12½ per cent rate, or the "capital net loss" for the year, the deduction for which is necessarily limited to 12½ per cent thereof, as a credit on the amount of tax otherwise due.

Basis for Determining Gain or Loss. The provisions of the new law covering the method of determining gain or loss resulting from the sale or other disposition of securities or other property are substantially the same as under the old law. The old law is clarified by providing specifically that where the basis for determining gain or loss is continued or carried over from one person to another or from one piece of property to another, not only the basis itself, but also the adjustments pertaining thereto must be continued or carried over.

Transactions must, as under all previous laws, be actually consummated. "Paper profits or losses", that is, unrealized profits or losses, are not recognized.

Miscellaneous. Certain new provisions are included in the 1932 Act relative to the taxability of income from domestic building and loan associations; depletion; the transfer of assets to foreign corporations; the payment of tax for foreign corporations; certain new provisions relative to the income of insurance companies; installment obligations; annuities; World War compensation, etc.

The matter of computing taxes for individuals or corporations using the fiscal year basis of reporting income or losses instead of reporting on calendar year basis (a portion of such year to be taxed under the 1931 laws under the amended Revenue Act of 1928, and a portion of which is to be taxed under the 1932 Act), requires determination by the same method as prescribed heretofore by the Treasury Department.

REPORT OF LIBRARY COMMITTEE

THE following report of the Library Committee is also the report of a special committee composed of the District Judges and members of the Library Committee, appointed by the president of this association, to negotiate arrangements for donating our library to the City and County of Denver.

It is proposed to give this valuable asset to the city, without consideration other than the latter's agreement to make the District Judges its exclusive managers, and to agree to keep it up to date, for the use of the courts and lawyers.

As long ago as 1903, when Judge Dunklee was president of this association and Judge Starkweather was one of the members of the Library Committee, the justice and desirability of having the law library belong to and be maintained by the city was officially urged by this association.

Matters took a different course, however, and the present library has been built up, somewhat by the donation of books belonging to members, but mainly by an allotment of the funds of this association paid out of dues of the lawyers who have belonged. Up until four years ago, the lawyers carried the entire burden, unaided. Beginning in 1927 the city has paid, through the District Court, the sum of $2,000 each year toward the maintenance and upbuilding of the library, which now consists of 7,544 volumes and is quite a good going concern, indispensable for the transaction of the business of the courts.

The annual sum of $2,000 has not been enough, and the association has been paying out of its own funds approximately $400.00 a year to supplement the city's contribution.

As regards the cash value of the library, it would no doubt be difficult for us to find a purchaser who is looking for such a library as a unit. To dispose of it piecemeal would be like junking an industrial plant, and would probably not net more than six or seven thousand dollars.

While very convenient for members of the Denver Bar, this library is indispensable for the Judges, and if it did not exist, or if this association did not see fit to donate the library or the use of it, it would be necessary for the city to create a new library, at a cost of about $30,000.

Perhaps in strict logic, or if money were plentiful, we might be warranted in exacting a substantial price from the city for this transfer. But this association exists for purely public purposes; and, moreover, several thousand dollars of the city's money have already gone into law books to which we hold the title. Therefore it seems proper not to ask any cash consideration whatever.

However, there is no reason why the lawyers of Denver should be specially assessed any longer, and the present appears to be an opportune time for the city to take over its responsibility, when the courts are about to move into the new building, where an excellent room has been provided for the library.

From the point of view of the members of this association, nothing substantial will be lost, and much will apparently be gained. The condition of the proposed gift will be that the city shall maintain and keep the library up-to-date, and that it will be administered by the District Judges, who will employ the librarian and govern the library, the funds therefor coming from the city through the appropriation for the Second Judicial District; the policy of the library will undergo no perceptible change, except that it will be possible for the judges, without taxing the lawyers, to continue a reasonable and conservative expansion of the library in the way of additional textbooks.

It is desired at today's meeting to obtain a broad authorization from the membership for the Board of Trustees to carry out the arrangement indicated above; and to that end I offer the following resolution and move its adoption:

"BE IT RESOLVED that the governing body of this association, namely, its Board of Trustees, be and they are hereby authorized by the members of The Denver Bar Association to give, transfer and deliver unto the City and County of Denver, the books and documents constituting the law library now the property of this association, upon such particular terms and conditions as to the control and upkeep of such library as they may think proper."

Respectfully submitted,

FRAZER ARNOLD,
Chairman.

(The foregoing resolution was duly adopted by the association.)

Dictaphun

IT'S HARD WORK, MATES

Frank L. Shaw, Esq., of the bar (so-called) of Monte Vista, an ardent admirer of Dictaphun, in a recent communication refers to the writer as a "columnist self-styled." The soft impeachment is neither here nor there. We are a columnist, and for the same reason that any one who assumes to conduct a column is a columnist. That is, we steal a paragraph from this source, lift a citation from that, and depend altogether on the work of other hands. Take correspondents for example. The Shaw aforesaid burdens the mail and now these pages with the following, for which we have cleverly coined a head line, the only actual work we do:

BLAME SHAW FOR THIS ONE

"As to the other objection—that the language is absolutely incorrect—if incorrectness from a legal standpoint is intended, the objection may be disposed of by citing Wigmore on Evidence, 1150 et seq. If philological incorrectness is referred to, the objection is more tenable; for while 'autoptic' is a good word, with pride of ancestry, though perhaps without hope of posterity, the word 'proference' is a glossological illegitimate, a neological love-child, of which a great law writer confesses himself to be the father (see Wigmore, *op. cit.*). Despite all of this, we cannot brand the statement as reversible error. This court is rather liberal in allowing the judges on the trial bench the privilege of big words. . . . We (have) refused to reverse a judgment because a judge of a city court used the word 'obvious' in his charge of the jury."—*Morse v. State,* 10 Ga. Ap. 61.

BLAME PLUNKETT FOR THIS ONE

E. J. Plunkett, Esq., Assistant Attorney General of this sovereignty, while pursuing (we assume) the duties of his office, lighted upon that which follows, and caused it to be transcribed and delivered to the Editor-in-Chief. The last-named wrapped it in cellophane and sent it to us. Here it is:

"Plainly the insertion of the numerals 1475 and 2280 and the character XCIII is a bull."—*McLendon v. Columbia,* 5 A. L. R. 995.

BLAME ROBINSON FOR THIS ONE

J. E. Robinson, Esq., of the Denver Bar who, as does General Plunkett, thinks the Editor-in-Chief has something to do with this magazine, sent the quotation below from *Starr v. People,* 28 Colo. 184, to that dignitary. We use it, fearful of the consequences:

"(The plaintiffs in error) were convicted of the offense of offering a bride of $500 to one A. G. Wharton." Which leads the Editor-in-Chief's correspondent to inquire, "When has it been a criminal offense to offer or accept a bride worth $500?"

BLAME HEALD FOR THIS ONE

E. Clifford Heald, Esq., also of the Denver bar, accuses us in a direct communication of having overlooked a decision of a California District Court of Appeals, reported as *Hawthorne v. Gunn,* 11 Pac. (2d) 411. What we should like to know is the answer to the last sentence of the excerpt.

"Conceding that under some circumstances the voluntary action of a young lady in sitting upon the lap of a young man might establish a prima facie case of contributory negligence, it cannot be held, as a matter of law, that this result obtained here. . . . Whether or not a reasonable person would assume such a position depends upon many conditions of time, place, and circumstance.

BLAME HOLLAND FOR THIS ONE

Fred Y. Holland, Esq., likewise of the Denver bar, presents an Irish opinion of some American innovations which, avers Mr. Holland, is to be found in 65 *Irish Law Times* 107, as follows:

"We hear of two epoch-making discoveries in America that may some day be introduced here to affect the administration of justice. One is a serum which, being administered to the patient, causes him to speak truth only. The other is a new scientific 'breath-smeller' which registers any degree of intoxication merely by catching some of the drinker's breath, and is so sensitive that it detects alcohol even when its distinctive odour is unnoticeable. Clearly these discoveries, if they can be applied in practice, will revolutionize the administration of law. Perjury, 'the results of bad observation,' 'things witnesses honestly think they saw' will disappear from our courts. Instead of being assailed by a deadly fire of cross-examination a suspect witness will have some serum injected so that he may, powerless to prevent it, pronounce a devastating recantation. Policemen apprehending 'drunks' will renounce the time-honored tests of walking a chalked line and saying "British Constitution.' Instead they will tender evidence of the result of the application of the 'breath-smeller.' We wonder, however, under what authority people must submit to scientific treatment."

THE MINERS CHOOSE NO LAWYERS

Joseph H. Murray, Esq., of the Denver Bar, has furnished the following excerpt from the laws of Trail Creek Mining District, Clear Creek County. They are of record, so he avers, in the office of the Clerk of that great quasi-municipal corporation. To wit:

"Resolved, that no Lawyer, Attorney, Councellor, or Pettifoger shall be allowed to plead in any case or before any Jury or Judge in this District."

"Adopted June 5th, 1861."

♦ ♦ Trial Court Decisions ♦ ♦

John Hancock, etc. Co. against Cohen, et al. No. A-3669. *In the Denver District Court before Judge Starkweather.*

Plaintiff is the holder of a note signed by defendant and secured by a deed of trust on property owned by him. The defendant collected from the tenant of the property, rent for five months in advance and shortly thereafter made default in the terms of the trust deed. The plaintiff thereupon secured the appointment of a receiver in the above case, and the receiver served the tenant with a three day notice requiring payment of a month's rent in advance. The tenant failing to vacate or to pay any rent on the ground that he had already paid the rent to the defendant owner, the receiver now applies to the court for an order requiring the tenant to pay him a month's rent or vacate.

Held: That the tenant must pay rent to the receiver or vacate the premises, even though he has previously paid rent to the owner of the property. Order granted.

Kastner vs. Kastner. In the Denver District Court, No. 97125. *Before Judge Dunklee. Decided June 20, 1932.*

This is one of the large number of cases now pending in which a final decree of divorce was entered on motion of the adjudged guilty party pursuant to the provisions of S.L. 1925, Chapter 90, Page 237 (later held unconstitutional in Walton v. Walton, 86 Colo. 1), and the guilty party subsequently married another person in reliance on such final decree.

The findings of fact and conclusions of law in this case were made and signed on March 13, 1928, and on September 15, 1928 a final decree of divorce was signed by the Court upon motion of the attorney for the defendant (the adjudged guilty party), the defendant subsequently marrying another woman. Later a motion was filed by the defendant to reduce the amount of support money payable to the wife, and on August 7, 1929 the Court signed an order termed a "modified decree" changing the alimony support money from $50.00 per month to $25.00 per month for the support of the minor child.

On August 13, 1929 plaintiff moved to vacate this decree and for a new trial, and on September 9, 1929 plaintiff filed a "Supplemental motion to vacate modified decree and for a new trial," raising for the first time the point that the original final decree was void under the decision of the Supreme Court in Walton v. Walton, 86, Colo. 1 (decided March 4, 1929). Both of plaintiff's motions to vacate and for a new trial were denied and plaintiff brought error to the Supreme Court, which held that the decree of divorce was void because entered at the request of the guilty party, but that the Court had jurisdiction to enter an order in reference to the support money. The Court therefore affirmed the portion of the judgment in reference to the support money, and reversed the Court for its refusal to set aside the decree of divorce

and remanded the case for further proceedings in harmony with its opinion (Kastner v. Kastner, 9 Pac. 2nd, 290).

This matter now comes on to be heard upon defendant's motion filed April 20th, 1932 to set aside the final decree of divorce on the ground that the same was null and void, and upon defendant's petition filed the same date, to amend the original findings of fact and conclusions of law entered and signed May 13, 1928, so as to include the statutory clause as provided by S.L. 1929, Chapter 91, Page 327, and also upon the answer to the petition filed by plaintiff on April 28, 1932 objecting to such amendment of the findings of fact and conclusions of law.

The Court finds the facts as above set forth, and then proceeds as follows:

TENTH. The Supreme Court holds in its opinion in this case of Kastner v. Kastner, as above cited, among other things as follows:

"The court erred in its refusal to set aside and vacate the decree of divorce herein, and therefore this portion of the judgment is reversed; it did not, however err in making and entering its order of August 7, 1929, with reference to alimony and allowance for the maintenance and education of the minor child, and this portion of the judgment is affirmed, costs herein to be taxed to defendant in error, Julius Kastner. The cause is accordingly remanded for further proceedings in harmony herewith."

ELEVENTH. The court has given careful attention and study to this case upon the records as disclosed herein with a view to finding some legal way to straighten out the unfortunate situation which the parties find themselves in by virtue of the fact of the conflict between the said decision of the Supreme Court and the provisions of said Chapter 90, S. L. 1925, adjudged unconstitutional after the decree was signed herein on the 15th day of September, 1928, adjudicated as void by the said Supreme Court decision herein, and for the further reason that there are quite a large number of other cases upon the docket of this court in the same legal situation, some of which have been before the court for adjudication.

TWELFTH. The court finds that the law as heretofore construed by the Supreme Court goes to great lengths to uphold the legality of a second marriage as a matter of public policy. In the case of Pittinger v. Pittinger, 28 Colo. 308, the court holds that where a marriage has been shown between a husband and wife, and thereafter a legal marriage has been established by either the husband or the wife to another party, the law raises the presumption that a divorce had been granted, and puts the burden of proof upon the party challenging the legality of the second marriage to prove to the contrary.

On page 311 the court says:

"By some of the authorities this presumption is said to be one of the strongest known to the law. Its strength increases with the lapse of time. This presumption arises because the law presumes morality and not immorality, and that every intendment is in favor of matrimony. Lampkin v. Ins. Co. 11 Colo. App. 249; 2 Nelson Divorce and Separation, Sec. 580; Boulden v. McIntire, 21 N. E. Rep. 445; In re Rash's Estate, 53 Pac. Rep. 312; Teter v. Teter, 101 Ind. 129; Johnson v. Johnson, 114 Ill. 611.

"This presumption applies with peculiar force in favor of one who is

unable to prove affirmatively that the man with whom she entered into the marriage relation in good faith was divorced from a former wife."

A number of other cases could be cited to the same effect.

THIRTEENTH. After the decision of the Supreme Court of March 4, 1929, in the said Walton v. Walton case, declaring Chapter 90, S. L. 1925, unconstitutional, the legislature by Chapter 91, S. L. 1929, p. 327, by an act approved May 9, 1929, passed a new act concerning marriage and divorce remedial in its provisions.

On page 329 among other things is the following clause:

"The General Assembly hereby finds and determines that it is contrary to public policy to permit the marital relation to remain undecided for a period exceeding six months after the signing of the findings of fact and conclusions of law, and that the public welfare requires that suits of divorce shall be definitely determined and ended within a reasonable time after the trial thereof.

"Section 3. No action shall be brought after the expiration of one year from the date that this act takes effect to set aside or to attack the validity of any decree of divorce heretofore granted upon the ground that the decree was entered upon the motion of the party who was not entitled to the decree."

FOURTEENTH. For the foregoing reasons the court finds and rules as follows herein, to wit:

a. That said motion filed herein asking that the decree of September 15, 1928, be set aside as null and void as per the decision of the Supreme Court of the state of Colorado herein be granted.

b. That the said answer to the petition of the defendant filed herein April 28, 1932, objecting to the said petition, filed herein April 20, 1932, is overruled.

c. That the said petition of April 20, 1932, to amend the Findings of Fact and Conclusions of Law so as to contain the automatic clause as provided for in said Chapter 91, S. L. 1929, p. 327, is granted, and the court signs the amended Findings of Fact and Conclusions of Law containing said clause, and orders the same filed herein.

d. The court overrules all of the other objections of the plaintiff to the proceedings herein and to the Amended Findings of Fact and Conclusions of Law.

The Court amended the findings of fact and conclusions of law entered March 13, 1928 by adding the following:

ELEVENTH. The court finds as a matter of law that the plaintiff is entitled to a decree of divorce herein at any time hereafter when she chooses to ask for same.

TWELFTH. That at the expiration of six months from the date of these findings of fact and conclusions of law, if the same have not been set aside and no motion to set the same aside remains unheard and undecided, these findings of fact and conclusions of law shall operate as a decree of divorce upon the terms and conditions in said findings of fact and conclusions of law, subject to any modification of the terms or provisions thereof by any intervening order or the court may enter a final decree of divorce or any other order or decree to set forth any terms, conditions or other matters properly included in a final decree.

• Supreme Court Decisions •

(EDITOR'S NOTE.—It is intended to print brief abstracts of the decisions of the Supreme Court in the issue of Dicta next appearing after the rendition thereof. In the event of the filing of a petition for rehearing, resulting in any change or modification of opinion, such will be indicated in later digests.)

TAXATION—POWER TO TAX MUNICIPALITY—*People v. City and County of Denver*—No. 12690—*Decided May 2, 1932—Opinion by Mr. Justice Campbell.*

1. In an action by the state to recover unpaid gasoline taxes from the city, the fact that the municipality is a home rule city is of no consequence.

2. Gasoline used by the city in the construction, maintenance and repair of its highways is not taxable within the meaning of the statute. (See *People v. Weld County.*)

3. The fact that Denver is a home rule city does not make the streets merely local highways for the use of the residents of citizens of Denver alone. City streets are state highways.—*Judgment affirmed.*

DAMAGES—DENYING CHANGE OF PLACE OF TRIAL—GIVING JUDGMENT AGAINST ONE OF TWO DEFENDANTS WHO DID NOT FIRE SHOT THAT RESULTED IN PLAINTIFF'S PERSONAL INJURY—AWARDING OF EXEMPLARY DAMAGES—*Reyher v. Mayne*—No. 12410—*Decided May 2, 1932—Opinion by Mr. Justice Hilliard.*

1. Plaintiff, who was a Sheriff of Kiowa County, sued two brothers for damages for personal injuries and recovered general and exemplary damages, the basis for the suit being that the defendants, without right, entered upon certain premises where the plaintiff was in the legal enjoyment of hunting privileges and carelessly discharged guns at the plaintiff's decoy geese while the plaintiff was in a blind nearby, killing some of the geese and some of the shot striking the plaintiff as he suddenly arose from the blind; the complaint also included damages for the loss of the geese.

2. The court did not abuse its discretion in denying application for a change of place of trial on the alleged bias of the people of the county of which the plaintiff was then Sheriff, on the claim that it was impossible to secure an impartial jury, where there were affidavits, both in support of and against the application. In the absence of the abuse of discretion, the trial court's determination of the question is controlling on review.

3. Where both the defendants were unlawfully hunting upon the land where the plaintiff had a right to be, and where both of them shot at and killed some of the plaintiff's decoys, and while they persisted in this unlawful act, the shots from the gun of one of them injured the plaintiff, it is no defense that the shots from the gun of one of them only injured the plaintiff.

4. It is the fact of participation, not the degree, or the extent, or the particulars, that makes every participant in such a tort liable. Each defendant here is properly answerable for the sum or aggregate of the damage inflicted by both wrongdoers.

5. The Court erred in submitting to the jury the right to recover exemplary damages; while the defendants were wrongfully on the premises, there is no reason to believe the defendants were prompted by any evil purpose toward the plaintiff. They did not see the plaintiff, nor the blind in which he was concealed, and when they started firing at the geese, the plaintiff unexpectedly emerged from the blind and was struck by the shot.

6. In such case, the circumstances negative any evil intent on the part of the defendants to injure plaintiff, and they were not guilty of such wanton and reckless disregard of plaintiff's rights as to evidence wrongful motive, and there was an entire absence of malice.—*Judgment modified by eliminating exemplary damages, and affirmed as to the balance.*

CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENSES—EFFECT OF VERDICT OF NOT GUILTY ON CERTAIN COUNTS AND VERDICT OF GUILTY ON SIMILAR COUNT—EFFECT OF WITHDRAWAL OF CERTAIN COUNTS—*Crane v. the People*—No. 12726—*Decided May 2, 1932—Opinion by Mr. Justice Burke.*

1. Where defendant and others were charged with conspiracy to obtain money by means of false pretenses in eleven different counts, all growing out of the same transaction, and at the close of the Peoples' evidence, the People withdrew six of the counts and the jury returned a verdict of not guilty on four of the remaining counts and of guilty on the remaining one, the withdrawal of the six counts did not amount, in law, to verdicts of acquittal on all.

2. In such case, the verdicts of not guilty on the four remaining counts are not inconsistent with and do not render impotent the verdict of guilty on the remaining count.

3. *Webb v. The People,* 83 Colo. 1, overruled.—*Judgment affirmed.* Mr. Justice Butler and Mr. Justice Hilliard dissent.

CRIMINAL LAW—LARCENY—EMBEZZLEMENT—SUFFICIENCY OF INFORMATION—SUFFICIENCY OF VERDICT—APPEARANCE OF SPECIAL COUNSEL—RULINGS ON EVIDENCE—*Critchfield v. The People*—No. 12399—*Decided May 2, 1932—Opinion by Mr. Justice Alter.*

1. An objection to an information on the ground of duplicity in that it charges both larceny and embezzlement in one count comes too late when such objection is raised to the introduction of evidence.

2. Where an information is duplicitous, the objection must be presented either by motion to quash or demurrer.

3. Neither a demurrer or a motion to quash can be properly made while a plea to the indictment or information stands.

4. Where a defendant is found guilty under an information charging both larceny and embezzlement in one count, and no objection is made to the form of the verdict given, the Supreme Court will not consider any errer therein raised for the first time in this court.

5. Where, after a jury has been empaneled and sworn, but before the introduction of any evidence upon motion of the District Attorney, additional counsel was endorsed for the People, and the defendant objects thereto, the objection is overruled, but defendant's counsel makes no application for a further opportunity of examining the jury with reference to their relations and acquaintance with such newly entered counsel and there is no indication that the substantial rights of the defendant were prejudiced, the ruling of the Court in permitting additional counsel to be so entered is not error.

However, this practice is condemned and as a general rule defendant's counsel should have ample notice of all counsel to appear in the trial of the cause so that the opportunity of interrogating respective jurors may be full and complete.

6. Where the prosecuting witness, in a cattle stealing case, was asked on cross examination if he thought he could claim a reward for the prosecution and he answered "No," and on objection by the People, the question and answer were stricken, such ruling of the Court was improper, but in view of the fact if the answer had stood, it would have shown no interest in the witness and when it was stricken and the record was silent as to his interest, error cannot be predicated thereon.—*Judgment affirmed.*

APPEAL AND ERROR—DIVORCE—TIME WITHIN WHICH APPEAL MUST BE MADE FROM COUNTY COURT TO DISTRICT COURT—*Hayhurst v. Hayhurst*—No. 12524—*Decided May 16, 1932—Opinion by Mr. Justice Campbell.*

1. Appeals may be had from any judgment or decree of a county court in any action for divorce in the manner provided by law for appeals in civil actions.

2. Appeal must be made within ten days after judgment or within such further time as the county court may authorize.

3. Where in an action for divorce, the county court entered an order nunc pro tunc setting aside a former order vacating an interlocutory and final decree of divorce and at the same time, reinstates its previous interlocutory order and final decree and plaintiff prays for an appeal to the District Court and appeal bond is filed and approved within ten days thereafter, such appeal is taken in time.

4. An order of court vacating a previous order, setting aside a judgment is not a final judgment from which an appeal will lie, but where court re-enters original judgment, this is a final judgment as of the latter date.—*Judgment affirmed.*

ATTACHMENT AND GARNISHMENT—TRAVERSE OF GARNISHEE ANSWER—*Stollins, et al. v. Shideler, et al.*—No. 13056—*Decided May 2, 1932—Opinion by Mr. Justice Butler.*

1. Shideler obtained judgment in the County Court against Lawrence Roe and Julia Roe and caused a garnishment summons to be served upon Paramount Life Company. That Company answered denying indebtedness to the defendant and alleged that they employed Roe and others to move a house for $250.00 and that Roe was indebted to the garnishee in the sum of $25.00 for damages done to the house in moving, and that laborers employed on the job were claiming $248.40 for their work. The plaintiff traversed the answer. The other laborers intervened claiming the aforesaid $248.40 for services in moving the house. The plaintiff answered denying the allegations in the petition in intervention. Judgment was for the plaintiff in the County Court and upon appeal and trial in the District Court, judgment was for the plaintiff, and the garnishee and intervenors bring the case here for review.

2. The Court rightfully denied garnishee's motion to strike the traverse on the ground that it had been filed more than ten days after the expiration of the time allowed for the filing of the garnishee's answer where the answer was not filed until 13 days after the expiration of the time allowed. The garnishee by its own delay having made it impossible for the plaintiff to file the traverse within the statutory time is in no position to complain.

3. Where the garnishee and intervenors claim that before the work of moving commenced there was either an assignment by Roe to the intervenors of the money to become due Roe or that there was a novation whereby the garnishee became directly liable to the intervenors for the services they were to render and the evidence was conflicting, the ruling of the trial court against such claim will not be disturbed.

4. Where it is claimed that at the time of service of the garnishment summons the work had not been completed and therefore that part of the debt had not been impounded by the garnishment, but there was also evidence to the effect that the work had been completed at such time and moreover where such objection was not called to the attention of the trial court and the trial court was not given an opportunity to pass on the question this assignment is without merit.—*Judgment affirmed.*

REPLEVIN—COUNTER CLAIM FOR DAMAGES NOT INVOLVING POSSESSION OR DAMAGES INCIDENT THERETO—*Mason v. General Machinery & Supply Co.*—No. 13057—*Decided May 16, 1932—Opinion by Mr. Justice Moore.*

1. In an action for replevin of machinery a defendant cannot counterclaim for damages in repairing the machinery.

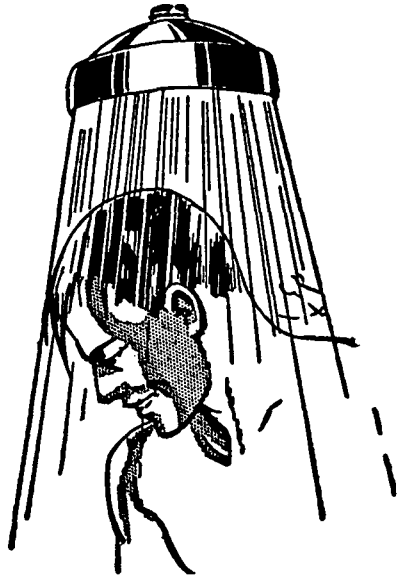
2. Replevin is a summary action to recover possession and damages for unlawful detention of personal property. The efficacy thereof would be lessened if a counter-claim, not involving possession or damages incident thereto, could be heard and determined therein.—*Judgment affirmed.*

NOTICE

In order to keep the files intact, the Denver Bar Association Library requires the following numbers of the American Bar Association Journal:

January, February, March, April, June, July for	1926
March for	1928
May, July, November, December for	1929
May, June, July, August, September, November, December for	1930
January, February, April, June, September, October, December for	1931
February for	1932

Any person having copies will confer a favor by communicating with the DENVER BAR ASSOCIATION LIBRARY, Court House, Denver, Colorado.



You'll Need Hot Water

a lot more this summer than you did during the winter-time. The children are more interested in their outdoor games than they are in keeping neat. And father can't keep clean when he takes a notion to tinker around the car. Then you know how popular the shower is after fast tennis matches, hikes, and auto trips.

Plan now for an abundant supply of hot water by ordering an Automatic Gas Water Heater installed at once. Mother will no longer have to make those many weary trips to the basement every time hot water is needed. An automatic heater never requires attention; water is *always* hot without waiting, and the cost is figured in pennies per day. Phone us now.

Public Service Company
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